

# Academic Freedom in an Illiberal Democracy: From Rule of Law through Rule by Law to Rule by Men in Hungary

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October 13, 2017 turned out to be a momentous day for the rule of law in Hungary.

This was an accident, as October 11, 2017 was meant to be the magic day.

October 11, 2017 was set by an amendment of the national higher education act, adopted in the spring of 2017, as major deadline for the continuing operation of foreign private universities in Hungary (Act no. 204 of 2011). By this date the Hungarian government – so not the affected university – was meant to conclude an international agreement with the government of the foreign university's seat regarding the continuing operation of that specific university in Hungary. Missing the deadline enables the National Education Authority to withdraw the operational license of the offending institutions to operate in Hungary.

Compliance with the October 11, 2017 deadline was not made easy as the amendment expressly requires: in case the foreign university is located in a federation, the foreign federal government is expected to express its in principle prior approval for such an international agreement to be concluded between one of its constitutive units and the Hungarian government by the October deadline (Article 76(1)(a)). That the kind of international treaty or approval required by the Hungarian education may not exist in the law of the foreign federation clearly did not bother the Hungarian lawmaker.

The next magic date set by the same amendment is January 1, 2018. By this time, a foreign private university operating in Hungary is required to "conduct educational activities" in the country of its accreditation by January 1, 2018 (Article 76(1)(b)). The Venice Commission noted in its preliminary opinion on the Hungarian law that this requirement is vague and open to various interpretations (para. 97). As if to prove this point, in early October when CEU concluded a [memorandum of understanding on academic cooperation with a US-based institution](#), the Hungarian secretary of education took the opportunity to clarify in a television interview that "conducting educational activities" meant having an accredited degree program in the original accrediting state by the deadline. If so, this is yet another impossible condition to meet: eight months are hardly sufficient to receive accreditation for a new degree program in any legal system.

Although the amendments of the higher education act apply to all foreign-accredited universities in Hungary, the rules appear to target one institution: Central European University (CEU). To dispel doubts to this effect, the governing majority made did not hide it in the parliamentary debate of the bill as well as in the press, that they were set on teaching a lesson to the "Soros university," a tag referring to the founder of CEU, Mr George Soros. As soon as the amendment was tabled in parliament, the voices kept repeating in the press: the Soros university deserves no exception, everyone is expected to obey the law in Hungary.

The amendment took thousands of demonstrators to the streets in Budapest, triggered an avalanche of support for CEU from the international academic community, and was condemned in both the European Parliament and the Parliamentary Assembly of the Council of Europe. To express its disapproval, the European Commission has commenced [infringement proceedings](#) against the Hungarian government, and the [Venice Commission issued a preliminary opinion](#) voicing serious concerns about the rules as they were meant to apply to already existing universities. A group of opposition MPs brought [a challenge against the law before the Hungarian Constitutional Court](#), which decided to form a special working group for the matter after it received briefs from several amici.

In short, compliance with the October 11 deadline looked as the benchmark for testing the operation of the rule of law in Hungary, and in Europe: it does not take more than simply taking stock of what did and what did not happen by this deadline. The Venice Commission's preliminary opinion in August 2017 or the EU infringement

procedure did not prompt the Hungarian government to revise the amendment before the October 11, 2017 deadline. Although the Hungarian government did negotiate an agreement with the state of New York regarding CEU, it did not sign the deal by the October deadline. In the meantime, the infringement procedure is moving by its usual pace, and the Hungarian government's lack of cooperation is pushing it closer and closer to the desk of the Court of Justice of the EU. The Hungarian Constitutional Court is yet to decide in the matter. This state of affair has become a major source of anxiety and uncertainty for CEU.

Then, at lunchtime on October 13, 2017 two interesting things happened.

Out of the blue the [Hungarian Minister of Justice took to a press conference](#) and announced that the government is about to table a bill to extend the January 1, 2018 deadline with a year, by January 1, 2019. The [bill](#) has been tabled shortly afterwards. As a fine touch, the Minister of Justice emphasized "despite mounting international pressure which lacks any substantive legal argument the Hungarian government insists that Hungarian law applies to all, including Central European University."

About the same time, [atlatszo.hu](#), a freedom of information site received a [response on a freedom of information request from the Ministry of Human Resources](#). [Atlatszo.hu](#) asked the Ministry for the text of any such prior approval for an international treaty the government may have concluded under the amended higher education law. In response, the Ministry attached [a letter from the U.S. Secretary of Education dated on June 15, 2017](#) where Secretary DeVos wrote that

*"Education is primarily a state and local responsibility in the United States. Matters related to the legal status and degree-granting authority of not higher education institutions, including these higher education institutions operating in Hungary, are within the purview of state-level authorities and not the U.S. federal government. ... [T]he appropriate authorities with which to enter into discussions regarding the feasibility of such agreements are state-level authorities."*

If we can believe the Hungarian government's response to the freedom of information request, although it has never been stated expressly by, the October 11, 2017 deadline set by the amendment in fact has been met by the government with regard to all universities accredited in the U.S. on June 15, 2017. This information is better to learn late than never, especially when the operational license of a university is in the balance.

While these developments come as a relief to CEU, as far as the rule of law and academic freedom are concerned, this picture is bleak. Making up the law on the fly is not rule of law, not is even rule by law, it is rule by men. The rule of law is way too easy to mold into rule by law, and from there rule by men is a small step. Sadly, the rule of law appears to waver when it encounters rule by men. It can only stand up to raw political will if its defenders are willing to look past disingenuous rhetoric and naked tactics which are built on misusing its name. When academic freedom is at stake, this task is especially hard. Academic freedom may be a cherished foundation of liberal democracy and individual liberty, yet, it has been taken for granted for too long even by its very beneficiaries without much further reflection. Attacks like the Hungarian saga, or the more blatant violations, as in [Turkey](#), draw attention to the urgency of defining the conceptual foundations of a much forgotten liberty.

## **Hungary: rule by men in its prime**

By the spring of 2017 CEU has been operating in Hungary for over two decades. Its admittedly complicated corporate structure, complete with a university accredited in the U.S. in the state of New York, a Hungarian private university, and a foundation maintain the Hungarian university, was established according to transformation of Hungarian legal requirements applicable to foreign private universities over the years. Until the spring of 2017 there was little doubt that CEU was one university: it has one campus, in downtown Budapest, one faculty, one student body (see Venice Commission preliminary opinion, paras. 24 – 33).

The amendment of the higher education law was passed by the Hungarian parliament with the speed of light: the bill was tabled on March 28, 2017 and was passed by the Hungarian Parliament in a procedure of exceptional

urgency on April 4, 2017 amidst intense international and domestic protest. The need for urgency was later explained by the government as a measure to ensure that the new rules enter into force before the new academic year (Venice Commission preliminary opinion, para. 53).

The terms of compliance with the October 11, 2017 deadline has kept many on their toes. In [May 2017 the US State Department](#) urged the Hungarian government to amend the law, and negotiate with the effected universities directly. This was confirmed by the Education Secretary's letter of June 15, 2017, which the [Hungarian government has also presented to the world in its own words before](#) . If read literally these messages appear to confirm that the Hungarian amendment sets an impossible condition for the continuing operation of foreign private universities. This goes against the basic minimum of the rule of law in its thinnest iteration. As if to demonstrate that the October 11, 2017 deadline was not impossible to meet, the Hungarian government did sign other agreements, including with [the state of Maryland in July 2017, regarding McDaniel College](#). It was tabled for ratification in the Hungarian Parliament on October 8, 2017 and was [signed by the President on October 11, 2017](#), right on the magic day.

That in the meantime the Hungarian government decided to read the letter of Secretary DeVos as the federal government's permission for the states to negotiate with the Hungarian government is a welcome development, but it could certainly not have been foreseen. That this interpretation was disclosed in a response to a freedom of information request is also unusual, considering that in instances of similar magnitude the government communicated its stance about the enforcement of this law in the press. As such, the condition and its applications continues to run counter to the very essence of the rule of law on several counts.

To be clear: a foreign-accredited university, the fate of which hinges on such an international agreement was not meant to be part of the negotiations envisioned by the Hungarian amendment. The amendment does not provide any recourse for the affected university against the inaction of either government. In brief: the fate of an already functioning, and already accredited university depends on the political discretion of two sovereigns. If these sovereigns are unable or unwilling to agree with each other by the deadline set in Hungarian law, the sanctions fall on the one entity which is not provided with a seat at the table – at the discretion of the educational authority of the state which set the statutory condition in the first place

In short, after having passed a major amendment which fundamentally changes the conditions of operation for foreign private universities in an urgency procedure and without any public consultation, after having set a condition which can only be fulfilled by the government itself (with a gesture based on open political discretion), now CEU's future in Hungary depends on a further discretionary decision of the government not to enforce its own laws against the university. That the Hungarian government decided to extend the deadlines set by the amendment by a year on October 11, 2017 some two days *after* it failed to meet the deadline the deadline set for its own compliance under the law certainly may help CEU, yet, it does not help the rule of law. This saga is a far cry from legal certainty and the protection of legitimate expectations. This is rule by whimsical men who use legal provisions to communicate their momentary wishes to the world.

*A more detailed version of this article will appear soon on the [IACL blog](#).*

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